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amend his Petition prior to briefing issues related to the Court's gatekeeping role under the Anti-Terrorism and Effective Death Penalty Act (AEDPA).

Pursuant to the Court's May 18, 2017 Order, Dkt. 31, the parties must submit briefing on the issue of whether AEDPA conclusively authorizes district court review of Petitioner's successive petition. On July 28, 2017, the Court granted Petitioner's Opposed Motion for Stay and Abeyance in Light of *Moore* so Petitioner could exhaust his *Atkins* claim in state court in light of the United States Supreme Court's interceding decision in *Moore v. Texas*, 137 S. Ct. 1039 (2017). *See* Dkt. 40. Another evidentiary hearing was held in state court where the district judge ruled in Petitioner's favor. *Ex Parte Cathey*, No. 713189-B, Court's Findings of Fact and Conclusions of Law (176th Dist. Ct., Harris County, Tex. Jun. 15, 2020). Afterwards, the Court of Criminal Appeals declined to follow the ruling of the lower court and denied relief. *Ex Parte Cathey*, Writ. No. 55,161-02 (Tex. Crim. App. Apr. 28, 2021) (unpublished).

Accordingly, Petitioner believes it is in the interest of judicial efficiency to inform the Court of the related state court proceedings that occurred subsequent to the stay in this case before the parties brief issues related to the Court's gatekeeping function under AEDPA. An "[a]pplication for a writ of habeas corpus . . . may be amended or supplemented as provided in the rules of procedure applicable to civil actions." 28 U.S.C. § 2242; *see also*, Fed. R. Civ. P. 81(a)(2) (The civil rules "are

applicable to proceedings for ... habeas corpus”). Thus, federal habeas petitions may be amended “with ‘leave of court’ any time during a proceeding,” and “once as a ‘matter of course’” before a responsive pleading is served. *Mayle v. Felix*, 545 U.S. 644, 655 (2005) (citing Fed. R. Civ. Proc. 15(a); 15(c)(2)).

The State has not yet served a responsive pleading in this case; thus, Petitioner should be free to amend his petition without the State’s consent “as a matter of course.” *See* Fed. R. Civ. P. 15(a). In addition or in the alternative, Petitioner seeks the Court’s leave to file an amended petition because “justice so requires.” Fed. R. Civ. P. 15(a)(2). A petitioner should “specify all the grounds for relief available” and “state the facts supporting each ground” with particularity. *See* Habeas Rule 2(c). Thus, it is particularly important that Petitioner incorporate the facts and procedural history arising from the most recent state court proceedings that support his already pending *Atkins* claim before this Court.

Finally, in other federal habeas cases in which a stay was temporarily entered, at least two United States District Courts in Texas, including the Southern District, have granted leave to petitioners to amend their original petitions in conjunction with the reopening of the case. *See* Order, *Prible v. Thaler*, No. 4:09-cv-1896 (S.D. Tex. Jan. 3, 2012), ECF No. 32 (granting petitioner’s motion for leave to amend), *and* Order, *Prible v. Thaler*, No. 4:09-cv-1896 (S.D. Tex. Feb. 7, 2012), ECF No. 34 (ordering petitioner to file the amended petition in 98 days) (Exhibit A); *see also*

Agreed Mot. to Lift Stay and Enter Agreed Briefing Schedule, *Ibarra v. Lumpkin*, No. 6:02-cv-00052-ADA (W.D. Tex. Oct. 16, 2008), ECF No. 97 (where agreed briefing schedule permitted petitioner to submit an amended petition in 81 days) (Exhibit B).

Accordingly, Petitioner proposes the following briefing schedule. Attached is a form of a proposed scheduling order. Other than the schedule for filing an Amended Petition, the State has indicated it has no issues with the remaining dates proposed below.

1. Petitioner will file an Amended Petition by July 29, 2022.
2. The State will file a motion related to the Court's gatekeeping role under AEDPA by November 21, 2022.
3. Petitioner will file a response to the State's motion by February 19, 2023.
4. State may file a reply to Petitioner's response by March 21, 2023.
5. Petitioner may file a sur-reply to the State's reply by April 20, 2023.

Dated: May 2, 2022

Respectfully submitted,

/s/ Layne E. Kruse

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CERTIFICATE OF CONFERENCE

This motion is filed pursuant to the Court's March 31, 2022 Order, Dkt. 43. Counsel for Petitioner conferred with opposing counsel regarding this motion, and the parties' primary disagreement regarding the scheduling order was the inclusion of a period for Petitioner to amend his Petition.

Certified this 2nd day of May, 2022.

/s/ Layne E. Kruse
Layne E. Kruse

CERTIFICATE OF SERVICE

I certify that on May 2, 2022 a copy of the foregoing motion was served via PACER/ECF upon opposing counsel identified below. Counsel consented in writing to electronic service.

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